

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

MMI
23601

FILE: B-208268

DATE: November 16, 1982

MATTER OF: Jon Clifford, et al. - Claims for
Retroactive Overtime Under FLSA

DIGEST:

1. Army disputes entitlement of recruiting specialists to retroactive overtime payments under Fair Labor Standards Act (FLSA). Where employees were considered exempt by agency in 1974 but Office of Personnel Management ruled otherwise in 1979, employees are entitled to overtime pay retroactive to 1974, subject to the 6-year statute of limitations. The statute of limitations is tolled only by filing claims in this Office.
2. Army questions sufficiency of evidence to support retroactive claims of overtime under FLSA. In the absence of official records, employee must show amount and extent of overtime by reasonable inference. Once employee has met the burden of proof, the burden shifts to the agency to rebut the evidence.

The issues in this decision involve the entitlement of 17 civilian employees of the Army to retroactive payments for overtime under the Fair Labor Standards Act (FLSA). We hold that the employees are entitled to retroactive payments based on a determination by the Office of Personnel Management overruling the agency on their exemption under the FLSA. These claims are subject to a 6-year statute of limitations and, in the absence of official records, these claims must be supported by substantial evidence as provided by the employees, subject to rebuttal by the agency.

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BACKGROUND

This decision is in response to a request from Major P. R. Bergeron, Finance and Accounting Officer, Headquarters Fort Devens, Department of the Army. The request concerns the claims of 17 recruiting specialists for retroactive overtime pay under the FLSA.

In August 1974, the Army determined that the civilian position of U.S. Army Reserve Recruiting Specialist, GS-301-7 (DA-1502), was exempt from coverage under the FLSA. However, following appeals by several employees, the Boston Regional Office, Office of Personnel Management (OPM), ruled in 1979 and 1980 that this position was not exempt under the administrative exemption criteria of the FLSA and that affected employees were entitled to overtime payments under the FLSA retroactive to May 1, 1974, the effective date of coverage of Federal employees by the FLSA.

The Army states that the Government should not be liable for retroactive determinations such as in this case. Furthermore, the Army questions the claims submitted by the 17 employees since compensatory time was informally used, particularly in lieu of sick leave, and there are no records of compensatory time being granted or used. Finally, the Army questions what would be considered adequate documentation to support the overtime claims.

DISCUSSION

Federal employees first became covered by the requirements of the FLSA effective May 1, 1974. See 29 U.S.C. §§ 201 et seq. (1976). Under the provisions of 29 U.S.C. § 204(f), OPM is responsible for administering the FLSA with respect to Federal employees, and the initial "exempt/nonexempt" guidance was contained in Federal Personnel Manual (FPM) Letter 551-1, May 15, 1974. The characteristics of an "administrative occupation" exemption were set forth as well as a list of positions which

normally would be exempt. The position of Recruiting Specialist, GS-301, was not listed as exempt from coverage under the FLSA.

Further exemption guidance was set forth in FPM Letter 551-7, July 7, 1975, but there was no reference to the job series or position in question here. Thus, we are faced with a decision by OPM retroactively overruling an agency determination that the position was exempt from coverage under the FLSA.

Our decisions have held that a determination of coverage by OPM is retroactively effective as long as the position has not previously been listed as exempt under published OPM guidelines. Power Systems Dispatchers, B-198717, December 21, 1981, 61 Comp. Gen. 152, and Electronic Maintenance Technicians, B-200112, December 21, 1981, modifying Meat Graders, B-163450.12, September 20, 1978. Therefore, these 17 recruiting specialists are entitled to payments of overtime under the FLSA retroactive to May 1, 1974, but subject to their producing sufficient proof of their claims and subject to the statute of limitations.

As we stated in Electronic Maintenance Technicians, all claims for retroactive FLSA payments are subject to the 6-year statute of limitations contained in 31 U.S.C. § 71a. The 6-year period runs until a claim has been filed with our Office. Filing a claim with the employing agency or OPM does not toll the statute of limitations.

A review of our records indicates that many of the 17 employees filed their claims with our Office for recording in 1980 and 1981. The claims of those employees who did not file previously were recorded on the date the Army request and the 17 claims were received in our Office (July 12, 1982). The entitlement of these 17 employees is limited to 6 years prior to the date listed:

Jon Clifford	--	July 12, 1982
Arthur J. De Filippo	--	January 5, 1981
George A. Douglas	--	January 14, 1981
Harry E. Douglas	--	December 22, 1980
Joseph D. Duarte	--	July 12, 1982
Raymond J. Faunt, Sr.	--	December 18, 1980
Peter J. Gailis	--	December 12, 1980
Doris L. Hamel	--	July 12, 1982
James R. Kane	--	December 31, 1980
Paula Lane	--	December 31, 1980
Gary L. Le Bouef	--	December 18, 1980
Edward F. Mc Greevy	--	December 31, 1980
Donald F. Moynihan	--	July 12, 1982
James T. Patulak	--	July 12, 1982
Richard F. Schelfhaudt	--	July 12, 1982
Leo A. Thibeault	--	October 1, 1980
Vincent J. Vivardo	--	December 16, 1980

With regard to the standard of proof necessary to substantiate a claim under the FLSA, our decisions impose a special burden on the agencies. Initially, the employee must prove that he has worked the overtime with sufficient evidence to show the amount and extent of his work as a matter of just and reasonable inference. Christine D. Taliaferro, B-199783, March 9, 1981. At that point, the burden of proof shifts to the employing agency to show the exact amount of overtime worked or to rebut the employee's evidence. Civilian Nurses, B-200354, December 31, 1981, 61 Comp. Gen. 174.

Thus, the agency cannot deny the overtime claims on the basis of incomplete or unavailable records. The FLSA requires employers to "make, keep and preserve all records of the wages, hours and other conditions and practices of employment." 29 U.S.C. § 211(c) (1976). Where the agency has failed to keep records, it must either rebut the employee's evidence by other means or pay the claims.

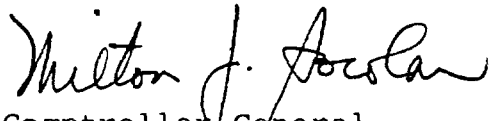
The amount of evidence submitted to substantiate these claims varies greatly among the 17 employees. For example, Ms. Lane has submitted a daily calendar listing the number of overtime hours each day from

1974 to 1979 and letters from her supervisors attesting to the fact that she worked 4 hours of overtime per day and 60 or so hours per pay period. Messrs. George A. Douglas, Harry E. Douglas, Raymond J. Faunt, and Vincent J. Vivardo have listed the drills and fairs or shows attended with dates and number of overtime hours listed for each session. Assuming that these four employees can substantiate their attendance at such programs through their former supervisors, we believe these four employees and Ms. Lane have met their burden of proof, and the burden now shifts to the agency to limit or rebut these claims. Similar evidence should be sought from the other 12 employees in question here.

Many of the recruiting specialists were paid night differential pay from 1977 to 1979 for, what was admitted by one supervisor, compensation in lieu of overtime. Most of the employees who received payment of night differential now wish to recharacterize their claims and claim overtime instead.

Where nonexempt employees work more than 40 hours in a workweek, the excess hours must be paid at a rate not less than 1-1/2 times the regular rate. 29 U.S.C. § 207(a)(1) (1976). The entitlement of these employees to overtime under the FLSA for the period they received night differential payments would depend on whether they worked more than 40 hours during a workweek in which they were paid night differential. See FPM Letter 551-1, Attachment 5. For example, we note that, for many employees, their tours of duty shifted from 0730-1600 to 1300-2200 on those days they were paid night differential. In computing these claims, the agency will have to compare entitlement under title 5, United States Code, and under the FLSA in order to give the employees the greater benefit. See 54 Comp. Gen. 371 (1974).

Accordingly, the Army should compute and settle these claims consistent with the above discussion.

for 
Comptroller General
of the United States